

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

WARD, *et al.*,

Defendants.

Case No. 2:08-CR-00283-KJD-PAL

ORDER

Before the Court is Defendant Markette Tillman's ("Defendant") Motion to Dismiss for Violations of Defendant's Speedy Trial Rights (#977). The Government responded (#979) and Defendant replied (#981). Defendant also filed an errata to his reply (#985).

I. Background

Defendant was indicted in late October, 2008 (#1). As all parties freely (and frequently) admit, this is a complex case. Defendant stands indicted on 19 counts including Conspiracy to Engage in Racketeer Influenced Corrupt Organization, Violent Crime in Aid of Racketeering, Use of Firearm During a Crime of Violence, Conspiracy to Engage in Drug Trafficking, and Possession with Intent to Distribute Controlled Substance (#652). A review of the docket in this case reveals that Defendant stipulated or moved to continue the date of trial on at least seven (7) prior occasions, not including oral motions for a continuance made during hearings (##112, 182, 204, 503, 640, 951, 963). It must also be noted that these motions both immediately preceded and continued after Defendant's first motion to dismiss for violation of speedy trial rights (#956). Defendant further moved or stipulated to at least thirteen other extensions of time for various pretrial matters (##502,

1 587, 596, 635, 637, 643, 646, 685, 691, 696, 698, 710, 731). Defendant has also filed more than 35
2 substantive pre-trial motions in this matter. It should also be noted that according to Defendant, “the
3 first two years of this case” were spent “engaged in an intensive death penalty mitigation
4 investigation.” (#977 at 3 ll. 9-11).

5 Near the end of February, 2013, former Chief Judge Robert C. Jones disappointed
6 Defendant’s long-time attorney John R. Grele for various unethical practices including: extorting the
7 court (#810 at 55), attempting to stage a § 2255 challenge (#810 at 55), and delay (#810 at 58). Mr.
8 Grele has appealed these actions to the Ninth Circuit (#824), however no judgment has issued. It is
9 undisputed that this disappointment forced Defendant to choose between proceeding to trial with
10 likely under-prepared counsel and seeking another continuance.

11 Defendant began asserting his right to a speedy trial on February 27, 2013. When faced with
12 the disappointment of Mr. Grele and the appointment of a new attorney, Defendant asked that Mr.
13 Grele be kept on; “I don’t want to have to sit in this detention center for another year and a half.”
14 (#801 at 48). Defendant much more strongly asserted this right in June of 2013. “I’m ready to go to
15 trial. I don’t even want to wait until November. I was ready to go in April. I’m ready to go in
16 September. I don’t want to waive my speedy trial right. I’m ready to go to trial.” (#932 at 20-21). The
17 Court also notes that the present motion is Defendant’s second motion to dismiss based on speedy
18 trial rights. (##956, 977).

19 Lastly, the Court acknowledges the death of potential witness Amelia McCurdy. Both sides
20 allege that their case has been harmed as a result of her death (#979 at 13 ll. 21-22; #981 at 9 ll.3-4).

21 II. Analysis

22 A. Legal Standard

23 The Court is required to use a “balancing test,” weighing the conduct of both the prosecution
24 and the defendant. Barker v. Wingo, 407 U.S. 514, 530 (1972). As noted by the Supreme Court, such
25 an approach compels courts to adjudicate speedy trial issues “on an ad hoc basis” centered on four
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1 factors. Id. at 530. These factors are 1) length of delay, 2) reasons for the delay, 3) defendant's
 2 assertion of his right, and 4) prejudice to the defendant. Id. at 530.

3 Length of delay is a "triggering mechanism", but is a soft standard as "the delay that can be
 4 tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy
 5 charge." Id. at 530. As for the reasons for the delay, deliberate delays to hamper the defense are
 6 weighted heavily against the government, while "neutral" reasons such as negligence or overcrowded
 7 courts are of less weight but count against the government. Id. at 531. Valid reasons "justify
 8 appropriate delay." Id. at 531. As for a defendant's assertion of his speedy trial right, it is "entitled to
 9 strong evidentiary weight [but] . . . failure to assert the right will make it difficult for a defendant to
 10 prove that he was denied a speedy trial." Id. at 531-32. Prejudice is assessed in light of a defendant's
 11 interests in 1) preventing oppressive pretrial incarceration, 2) minimizing anxiety and concern of the
 12 accused, and 3) limiting the possibility that the defense will be impaired. Id. at 532. Of these three,
 13 the last is the most serious. Id. at 532. However, claims of prejudice must be accompanied by non-
 14 speculative proof. United States v. Corona-Verbera, 509 F.3d 1105, 1113 (9th Cir. 2007).

15 Lastly, the Supreme Court has emphasized the difficult and holistic nature of the task before
 16 the Court:

17 We regard none of the four factors identified above as either a necessary or sufficient
 18 condition to the finding of a deprivation of the right of speedy trial. Rather, they are
 19 related factors and must be considered together with such other circumstances as may
 20 be relevant. In sum, these factors have no talismanic qualities; courts must still engage
 21 in a difficult and sensitive balancing process. But, because we are dealing with a
 22 fundamental right of the accused, this process must be carried out with full
 23 recognition that the accused's interest in a speedy trial is specifically affirmed in the
 24 Constitution.

25 Barker, 407 U.S. at 533.

26 B. Application

i. Length of Delay

It is undeniable that the nearly five and one-half years since Defendant's indictment is
 a lengthy and unusual delay. Accordingly, the Court finds that this "trigger" has been tripped, and the

1 Court will engage in a full analysis to determine whether Defendant's speedy trial rights have been
2 violated such that his motion to dismiss on that ground should be granted. However, the Court notes
3 that this is a complex case involving numerous charges and at times numerous defendants. Thus,
4 while the length of delay is sufficient to trigger the analysis below, the Court finds that this delay is
5 considerably more tolerable than it would be for a simple crime.

6 ii. Reasons for the Delay

7 Several reasons exist for the delay at issue here.

8 1. As just noted above, this is a complex case dealing with numerous counts and sometimes
9 numerous defendants. This is a valid reason justifying some delay.

10 2. Defendant engaged in a substantial pre-trial motion practice, filing more than 35
11 substantive motions during this period. This is a valid reason justifying some delay.

12 3. The first two years of this case were spent in "intensive death penalty mitigation
13 investigation." (#977 at 3 ll. 9-11). This is a valid reason justifying some delay.

14 4. Defendant moved or stipulated to motions to continue the trial on at least seven occasions,
15 not including oral motions made at hearings (##1112, 182, 204, 503, 640, 951, 963). It must be noted
16 that these motions both immediately precede *and follow* motions to dismiss for violation of
17 Defendant's speedy trial rights. Defendant cannot ask the Court to delay his trial, and then use that
18 delay to support dismissing his case for violation of his speedy trial rights. Accordingly, these
19 motions constitute a valid reason justifying some delay.

20 5. Defendant moved or stipulated to at least thirteen other extensions of time for various
21 pretrial matters (##502, 587, 596, 635, 637, 643, 646, 685, 691, 696, 698, 710, 731).

22 6. Former Chief Judge Robert C. Jones disappointed Defendant's long-time attorney John R.
23 Grele for various unethical practices including: extorting the court (#810 at 55), attempting to stage a
24 § 2255 challenge (#810 at 55), and delay (#810 at 58). New counsel was appointed, but substantial
25 time was—and likely is—required to adequately familiarize themselves with the case and prepare for
26 trial. Judge Jones was acting in his best judgment to protect Defendant's rights and to preserve the

1 dignity of the Court. Thus, even if the Ninth Circuit rules in favor of Mr. Grele, the delay in
 2 Defendant's trial was for a valid reason and justifies the ensuing delay.¹ Further, at the hearing where
 3 Mr. Grele was disappointed on February 28, 2013, the Court noted that Mr. Grele was seeking
 4 "further budget requests for "investigators and for a second attorney." (#810 at 5 ll. 22-24). Thus, it
 5 appears that even had Mr. Grele been kept on the case, he would not have been prepared to go to trial
 6 as scheduled.²

7 The Court finds that a host of valid reasons for delay justify the delay in this case.

8 iii. Defendant's Assertion of His Right

9 Defendant began asserting his right to a speedy trial on February 27, 2013. When
 10 faced with the disappointment of Mr. Grele and the appointment of a new attorney, Defendant asked
 11 that Mr. Grele be kept on; "I don't want to have to sit in this detention center for another year and a
 12 half." (#801 at 48). Defendant much more strongly asserted this right in June of 2013. "I'm ready to
 13 go to trial. I don't even want to wait until November. I was ready to go in April. I'm ready to go in
 14 September. I don't want to waive my speedy trial right. I'm ready to go to trial." (#932 at 20-21). The

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 16 ¹Defendant asserts a theme of "forced" continuations. Beyond Judge Jones' disappointment of Mr. Grele,
 17 Defendant alleges that he was forced to seek a continuance when the Court rejoined his trial with that of other defendants
 18 over his objection, as he "would need additional time to prepare to defend against the added enterprise acts . . ." (#981
 19 at 4 ll. 7-9). However, the court clarified in its order that "[j]oinder and severance are immaterial in this regard. Counsel
 20 has always been liable to prepare to litigate any enterprise act, even in a severed trial." (#791 at 4 ll. 13-15). Accordingly
 Defendant's argument on this point fails. The Court will address the continuance of Defendant's trial from May 6, 2014
 to July 7, 2014 at the upcoming hearing on that issue (#983). At bottom, in each of Defendant's "forced continuance"
 assertions, Defendant either sought the continuance or stipulated to it. Further, in all cases, the action supposedly
 "forcing" the continuance was for a valid reason and justifies some delay.

21 ²Defendant further argues that Simmons v. United States stands for the proposition that a defendant cannot
 22 permissibly be forced to choose between his constitutional right to effective assistance of counsel and his speedy trial
 23 rights. 390 U.S. 377, (1968). However, the Court in Simmons explicitly limited their holding to "these circumstances."
 24 Id. at 394. Those circumstances are that defendants should not be caught between the standing requirements of Fourth
 25 Amendment claims and the self-incrimination protections of the Fifth Amendment. Id. at 392-394. However, this
 26 dilemma was resolved by making testimony in support of a motion to suppress evidence on Fourth Amendment grounds
 inadmissible at trial on the issue of guilt (unless the defendant makes not objection). Id. at 394. This case is inapposite
 here for two reasons. First, the conflict between effective assistance of counsel and speedy trial rights are not the
 circumstances circumscribed by Simmons. Second, there is no intermediate remedy to relieve the tension between the
 rights asserted here. Defendant's extreme remedy of dismissing the case entirely on this ground is unsupported in the law,
 common sense, or justice.

1 Court also notes that the present motion is Defendant's second motion to dismiss based on speedy
2 trial rights. (##956, 977).

3 Defendant has not met his admittedly difficult burden of proving violation of his
4 speedy trial rights prior to last year, 2013, in part because he had previously failed to assert these
5 rights. Further, given that the delay since that time has been sought by Defendant as necessary for his
6 new counsel to prepare for trial, while the Court finds that the right has clearly been asserted, its
7 evidentiary weight is overcome by the reasons for the delay as discussed above.

8 iv. Prejudice to the Defendant

9 The Court acknowledges that Defendant has been incarcerated since he was detained
10 pending trial in November of 2008 (#977 at 14 ll. 23-25). However, it is at best unclear that any
11 entity other than Defendant is responsible for the increased "oppressiveness" of his numerous stints
12 in twenty-four and twenty-one hour lockdown (#977 at 14-15). Defendant further asserts that this has
13 hampered his ability to prepare his defense. However, Defendant fails to offer any particulars
14 whatever to this claim.

15 Defendant's most substantive claim, and the one the Court takes most seriously, is
16 that his defense has been compromised by the loss of McCurdy. While both the Government and
17 Defendant recount conflicting testimony given by McCurdy to third parties, neither (particularly in
18 light of the conflicting testimony) offers non-speculative proof of prejudice. Neither party is able to
19 claim with any certainty what McCurdy would or would not have testified to. Thus, any prejudice to
20 Defendant remains speculative.

21 v. Seriousness of the Crimes

22 While this circumstance is not enumerated in the standard cited above, the Court is to
23 engage in this "difficult and sensitive balancing process" considering "other circumstances as may be
24 relevant." Barker, 407 U.S. at 533. Here, the crimes charged are not the result of a momentary lapse
25 of judgment. Nor are they limited to a single bad act. Rather, the charges suggest the ongoing
26 management of a life and organization revolving around drugs and violence. Such activities pose a

1 serious threat to the public welfare, and warrant careful scrutiny. While this additional consideration
2 is unnecessary for the Court to reach its conclusion, it weighs against the extreme remedy of
3 dismissing the charges.

4 III. Conclusion

5 The Court has carried out this analysis with full recognition that the accused's interest in a
6 speedy trial is specifically affirmed in the Constitution. However, after careful consideration of all of
7 the circumstances of this case, including the four enumerated factors, the Court finds that dismissal
8 for violation of Defendant's speedy trial rights is unwarranted. However, the Court also expresses its
9 concern regarding the elapsed time in this case. Accordingly, the Court urges all parties to take all
10 reasonable steps to ensure that further delay is avoided. Defendant's Motion to Dismiss for
11 Violations of Defendant's Speedy Trial Rights (#977) is **HEREBY DENIED**.

12 DATED this 28th day of March 2014.

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16 Kent J. Dawson
United States District Judge